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CHANGE OF VENUE*

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A BASIC policy embodied in Wisconsin's statutory provisions for place of trial of actions is that a defendant is entitled to a trial in the county of his residence. While this is not true in all cases, as for example, in automobile accident cases where the plaintiff may, if he desires, bring the case in the county where the accident occurred rather than in the county where the defendant resides, the statutes do proceed on the basis that a defendant is entitled to have his action tried at home. Much time could be spent in discussing whether it is basically sound, although there is much to be said for it on the grounds of convenience. The question has been sometimes raised as to whether lawyers are unduly concerned about the possibilities of securing justice in other counties and whether they have not an exalted notion of their ability to sway jurors in their home counties.

However, if we proceed from the premise that a defendant is entitled to a trial in his home county, the decisions on the right to a change of venue when a cognovit judgment has been opened up and a trial granted, seem to reach an unfair result, a result which may be logical enough but which should be changed. In one case[1] arising in Milwaukee County, which was not the county of the defendant's residence, a cognovit judgment was entered in that county, the judgment was set aside on due proceedings therefor, and on motion of the defendant a change of the place of trial to his home county was ordered. The Supreme Court reversed this and held that the clause in the judgment note consenting to the appearance for the maker by any attorney in any court of record waived his right to a change of venue.

In another case[2] a contract of sale provided that in the event of an action being brought upon the contract by the seller, the place of trial would be any county chosen by the seller. It was held that the defendant had no absolute right to a change to the county of his residence. While it is, of course, arguable that in that case the parties had so contracted, this is not so clear in the case of a judgment note where the language does not refer to a place of trial but only to the place of entry of a confession judgment. It would seem fairer to provide that a defendant does not waive his right to trial in his home county unless such waiver is made after litigation has been commenced.

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*An address by Walter W. Hammond, Kenosha, Wis., member of the Wisconsin bar, at the annual meeting of Wisconsin's Board of Circuit Judges, Milwaukee, Jan. 7, 1941.

[1] State ex rel. Bobroff v. Braun, 209 Wis. 483, 245 N.W. 176 (1932).

[2] State ex rel. Kuhn v. Luchsinger, 231 Wis. 533, 286 N.W. 72 (1939).

Cases against municipalities, such as damage suits against a city or county, raise a question of the propriety of taxpayers of the defendant sitting on a jury. While the proportionate part of a judgment that each juror would pay would be extremely small, the suggestion has been made that the plaintiff in such cases should have the right to bring the action in another county. Here, however, the desires of plaintiff for larger damages would have to be weighed against the disadvantages to a defendant municipality that might be put to much additional expense in trying cases in other counties. It is one of those situations where convenience and economy in the handling of cases may outweigh supposed advantages to one particular group of litigants.

The provision that a motion for change of venue, if the county designated is not the proper place of trial, must be made within twenty days after the defendant has served his demand for a change of venue, allows little time for negotiations between the parties or investigation of a case. The provision as it now stands, of course, carries out the idea that such application should be made promptly and without delay. I think it would be proper to provide that this motion could be made at any time prior to the case being called for trial. No rights would be prejudiced and some disadvantages might be eliminated.

Automobile accidents are a large part of present day litigation, and it is only natural that such cases should give rise to questions of change of venue. For example, one attorney may represent several parties having damage claims which arise out of the same accident. By starting the cases in different circuits or by starting one in Civil Court in Milwaukee County and the others outside of Milwaukee County, an attorney may prevent those cases being joined for trial and thus either have two or more chances before different juries or create the possibility of sufficient added expense to the defendant that he may secure a better settlement than the facts may warrant. Again, an action may be brought against the insurance carrier alone and thus enable the plaintiff to control the place of trial, which he might not be able to do if he had to join the driver of the car. Then again, the plaintiff may designate some entirely different county for purely personal considerations and thus put the taxpayers of that county to the expense of a jury trial in a case which arose neither in that county nor in the county in which the defendant resides. These situations raise the question whether there should be a statutory provision making it possible to unite for trial in a proper county all automobile cases arising out of the same accident, no matter where or in what court the several cases may be started. You can immediately contemplate situations which would require considerable co-operation between the different courts that might be involved. If, however, the protection of the rights of taxpayers as well as litigants warrant the result, it should be possible to work out some

method to reach it and to determine the county for the trial. Here, again, must be kept in mind the basic policy of a defendant's right of trial in his home county, and caution should be exercised in any change that might be considered.

In addition to the power to combine cases regardless of where started, it is suggested that the court be empowered of its own motion to order the place of trial changed where the county named is not a proper county within the statutory rules and good reasons are not shown for the case being where it is. It may be that the courts now have such power, but it should be made clear that they do. This should, also, include the power to remand or return a case to the original court, if the reason for the change from that court no longer exists.

Divorce cases are always troublesome, and there always seems to be a desire for one reason or another to start such cases in a county other than the residence of either party. Sometimes this is said to be done to avoid publicity of the case. I fear that too often those may be the very cases where publicity is most needed to promote the ends of justice. I doubt whether publicity is actually avoided. Many times the case will secure more publicity than if brought at home. I notice from time to time items in Milwaukee papers listing the names and addresses of parties who have that day secured divorces outside of the county. If brought in Milwaukee they might not have secured even that much mention.

A prompt determination and completion of the case is sometimes given as the reason for taking divorce cases outside the home county. There are undoubtedly cases where for good and sound reasons this may be proper, but too often the real desire is to find a court where the plaintiff's counsel thinks that the background of the case may be unknown and where there is not available for the court's consideration the record of a previous case between the parties or the report of the investigation of prior marital difficulties. This may easily result in the granting of a divorce for the same party who after thorough hearing has been denied a divorce in the court of his home county upon the very grounds set out in the complaint in the other county. Then, too, final settlements in lieu of alimony may be made that are not entirely fair and may be made solely to avoid embarrassment of one of the parties, as for example, where the grounds for divorce are marital unfaithfulness and compromising situations resulting from relations with other parties. The county of residence may later have the problem of support of the wife where the duty of support should fairly have been placed upon a husband who may be amply able to provide it. The rights of dependent children may also fail to be fully protected. This result may easily follow where the trial court may be doing its best to do justice but does not have the benefit or opportunity to secure the whole

story and where it is difficult for the divorce counsel in that county to make as thorough an investigation as could be made in the county of residence of the parties.

As in all cases of abuse of statutory provisions, the remedy for such a situation is not easy, and there may be cases where trials of divorce cases outside the county of residence are warranted because of genuine and proper considerations. Providing that divorce cases may be tried and the court have jurisdiction thereof only in the county of residence of one of the parties unless changed by court order might be making the requirement too rigid. But it could be provided that courts that are called upon to hear such cases should defer the hearing until sufficient time had been allowed for an investigation and report of the case by the divorce counsel of the county of residence, and that the divorce counsel fee be paid to the divorce counsel who makes the investigation rather than to the divorce counsel in the county where the case is heard.

For the protection of the rights of children, there might be a provision that the supervision of alimony and support allowances should be conferred upon the county of residence of the parties rather than the county in which the divorce was granted.

A great deal can be done and many abuses terminated by a vigorous attitude by the courts that are called upon to hear such matters. Some years ago my own county and particularly the Municipal Court was overrun with Milwaukee divorce cases. The Judge recognized that abuses were present and that neither he nor the local divorce counsel had the opportunity to get the full situation before them. He announced that the home county of the parties was the proper place for such cases and that he would not hear any more of them unless he was shown some genuine reason for the case being brought in his court. When attorneys learned that they could not get them disposed of promptly but would have to submit to some investigation, the filing of such cases in that court ceased. A general power to remand cases to the proper county would help in such situations as this.

While there may not be many applications made for change of venue on the ground that an impartial trial cannot be secured in the county where the action has been commenced, the very infrequency of such cases emphasizes the importance to a party of having adequate provision therefor and for review thereof by the Supreme Court when he does feel that he cannot secure an impartial trial. The granting of such applications is a discretionary matter with the trial court and may be reviewed by mandamus proceedings only when there is a showing of abuse of discretion by the trial court.[3] In the case of *State ex rel. Car-*

[3] See Wisconsin Co-operative Milk Pool v. Saylesville Cheese Manufacturing Co., 219 Wis. 350, 263 N.W. 197 (1935).

penter v. *Backus*[4] a motion for change of venue on account of the prejudice of the people of the county was denied, the trial judge stating that he would consider the matter further if it should appear on the *voir dire* that the defendants could not have a fair and impartial trial in that county. The Supreme Court characterized this as a novel procedure, but approved it as a proper method of determining whether a fair and impartial trial could be had in that county. While this sounds logical enough, it is of no help whatever to a defendant who feels that he has shown adequate cause for a change of venue and must go up to the moment of trial and actually embark upon it, prepared to try the case if his motion for change of venue should then be denied. It is submitted that this case erroneously assumed that the only question involved was whether a fair and impartial jury could be impanelled. In the case of *Krueger* v. *State*,[5] Justice Owen pointed out that a fair trial does not consist in an impartial jury alone, and that it may be possible to secure a jury who had never heard of the case in a county where the sentiment crystallized in the court room is so tense and public feeling runs so high that knowledge thereof cannot be kept from the jury. As Justice Owen observed, under such circumstances the impossibility of a fair trial may exist even though an impartial jury be secured. To avoid the injustice of passing on such question at the commencement of the trial and to make possible a review of the court's determination by the Supreme Court, it should be provided that such questions be passed upon sufficiently far in advance of the trial that an application for mandamus by the Supreme Court could be made. Otherwise, a party who cannot have the question determined prior to the commencement of the trial cannot have the matter adequately presented or passed upon and reviewed.

I shall refer only briefly to changes of venue based upon a claim of prejudice of a trial judge. These situations are embarrassing not only to the court but also to conscientious counsel handling cases. I know of no great problem that exists in this connection because it is extremely seldom that any judge would insist on hearing a case when he knows that one of the parties may feel that he is prejudiced. I think it is generally recognized that it is just as important for parties to feel that they are getting a fair deal as it is that they actually get it, even thought after the trial before another judge that same party may feel that he did not secure it.

The provision that upon the granting of a change of venue because of prejudice of the trial judge the case may be transferred to another

[4] 165 Wis. 179, 161 N.W. 759 (1917).
[5] 171 Wis. 566, 576, 177 N.W. 917, 921 (1920).

county for trial seems unnecessary today. The provision for calling in another judge to try the case in the original county should be adequate in these days of comparatively easy transportation and would eliminate the inconvenience to the parties of a trial away from home. In circuit courts operating in branches, such as in Milwaukee County, and having continuous calendars, affidavits for change of venue because of alleged prejudice of a trial judge are difficult to file. These affidavits are limited to the naming of two judges, and I understand that under the Milwaukee practice an attorney will not know which one of the judges will try a particular case until the morning the case is called for trial and assigned for trial that day.

One suggestion of a type that is becoming more insistent and more important is that there be a right to a change of venue to a proper county as defined by the statute whether or not the action is commenced in a county court, a municipal court, a civil court or a circuit court. In other words, this is the same right the defendant would have if the action were brought in a circuit court originally. This would eliminate some of the situations which arise in Milwaukee County where cases can be brought in Civil Court, and a defendant must submit to judgment and appeal to the Circuit Court before he can exercise his absolute right to a change of venue to the proper county, and even then secure only a review of the findings of the Civil Court rather than a trial. It is difficult to explain to a client how justice is being promoted when he may have been unfortunate enough to have been caught for service of process from a municipal or civil court in a county where he does not reside and has to go to that county or engage counsel there when, if the case had been brought in a circuit court, it could promptly have been transferred to his home county.

This situation suggests the importance of uniform provisions applicable to all municipal courts, civil courts, inferior courts and county courts having civil jurisdiction. While some of the acts creating these various courts do make provisions for such changes, there is nothing uniform about these provisions, and some court acts contain no provision for such changes. At the present time there are some thirty-seven county courts having civil jurisdiction and there are twenty-eight municipal and inferior courts. Not only is there a lack of uniformity of provisions for change of venue but there is a lack of uniformity as to jurisdiction and many other matters. A committee of County Court judges is now considering the advisability of legislation making these provisions uniform for all county courts. It might well be asked why municipal and inferior courts should not also be included and uniformity secured not only for changes of venue but other matters as well.

In fact, there are those who say that we should have only one general court or system of courts, and that this should embody all civil, probate and criminal jurisdiction, and operate with such branches as may be necessary, with suitable supervision and control to see that all business is promptly and efficiently handled. Such a system, for example, would eliminate the difficulty in supervision of alimony and support money allowances after judgment. It would simply be transferring the matter from one branch of a court to another branch of the same court for handling.